

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

HERBERT WHITE,  
Appellant;

v.

UNITED STATES POSTAL SERVICE,  
Agency.

DOCKET NUMBER  
DA0752930004-I-1

DATE: JUN 11 1993

Gail M. Dickenson, Esquire, Dallas, Texas, for the  
appellant.

J.D. McAlester, Dallas, Texas, for the agency.

BEFORE

Daniel R. Levinson, Chairman  
Antonio C. Amador, Vice Chairman  
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has petitioned for review of the December 10, 1992 initial decision dismissing his appeal as untimely filed. For the reasons set forth below, the Board GRANTS the petition, REVERSES the initial decision, and REMANDS the appeal for further adjudication.

BACKGROUND

The agency indefinitely suspended the appellant on July 13, 1991, based on an indictment returned against him. The appellant did not appeal the imposition of this suspension.

Over fourteen months later, on August 21, 1992, the appellant was acquitted of the criminal charges against him. On September 4, 1992, the appellant met with the agency's Labor Relations Representative and requested reinstatement effective August 22, 1992, the day following the acquittal. Initial Appeal File ("IAF"), Tab 4, Subtab 1. Thereafter, the agency notified the appellant that he was to be returned to pay status effective September 5, 1992, and the appellant was reinstated as of that date. IAF, Tab 1 at 5.

On October 1, 1992, the appellant appealed the continuation of his suspension from August 22, through September 4, 1992. IAF, Tab 1. The agency then moved to dismiss the appeal as untimely filed. IAF, Tab 4. In his initial decision, the administrative judge found that the appellant had failed to show good cause for the lengthy delay between the imposition of the indefinite suspension and the filing of his appeal, and dismissed it as untimely under 5 C.F.R. § 1201.22(b) (1992). IAF, Tab 5.

In his petition for review, the appellant argues that having recognized the indefinite suspension as valid when imposed, he refrained from frivolously challenging it, filing his appeal only when the agency improperly continued the suspension beyond the occurrence of its condition subsequent. Accordingly, he contends that he has demonstrated good cause for his delay. We agree.

ANALYSIS

The Board has long recognized that an indefinite suspension that is valid when imposed, may nonetheless become improper in light of later developments. Specifically, the Board has ruled that an indefinite suspension must terminate upon the occurrence of an ascertainable condition subsequent. *Martin v. Department of the Treasury*, 12 M.S.P.R. 12, 17 (1982); see also *Jarvis v. Department of Justice*, 45 M.S.P.R. 104, 111 (1990) (where an agency has relied solely on an indictment to establish its original indefinite suspension, and the only condition subsequent is the resolution of the criminal charges, it is unreasonable to continue the suspension after the date the indictment is dismissed, and appellant is entitled to back pay for such a period). The Board has further found that an order sustaining a suspension explicitly or implicitly mandates that the agency move expeditiously in terminating the suspension upon the occurrence of the condition subsequent, and that an agency's failure to do so may be brought before the Board by filing a petition for enforcement under 5 C.F.R. § 1201.181. *Martin*, 12 M.S.P.R. at 20.

In the present case, the Board lacks an order to enforce because the appellant did not appeal the imposition of the suspension action. Nonetheless, we find that the "appellant should not be foreclosed from challenging the continuing nature of the suspension now because he recognized that an earlier challenge would waste his, the agency's, and the

Board's time and resources...." *Hofmann v. Department of Agriculture*, 31 M.S.P.R. 399, 401 (1986).

In *Hofmann*, the agency indefinitely suspended the appellant because of an outstanding indictment against him, and the appellant subsequently withdrew his initial petition for appeal on the ground that he lacked a good-faith defense. *Id.* at 400-401. Over two months after the effective date of the suspension, the indictment was dismissed, but the agency neither returned the appellant to duty nor instituted other disciplinary proceedings against him. *Hofmann v. Department of Agriculture*, 42 M.S.P.R. 453, 454 (1989). Three months later, the appellant petitioned for "enforcement" of the initial decision dismissing his earlier appeal. *Id.* at 455. The administrative judge dismissed the petition on the grounds that there had been no decision on the merits and that there was therefore nothing to enforce. The Board, however, in granting his petition, stated that:

[A]ppellant's petition for enforcement should be interpreted as a petition for appeal of his allegedly improper suspension. Moreover, under the facts of this case, we find that good cause exists for the delay in filing the petition for appeal. Specifically, we note that appellant promptly notified the agency that the indictment against him had been dismissed and allowed the agency a reasonable amount of time to cancel the suspension. When the agency failed to take action, appellant pursued the matter with the Board in a manner consistent with prior Board cases involving indefinite suspensions. Thus, to the extent that petition is untimely, we find good cause to waive the Board's regulatory time limit.

*Hofmann v. Department of Agriculture*, 31 M.S.P.R. 399, 401 (1986) (citations omitted).

We conclude that the appellant here also acted properly in awaiting the disposition of his criminal charge, and the agency's decision on whether to reinstate him, before bringing his appeal. Indeed, as he argues, until these events transpired, he had nothing to appeal, in that the initial imposition of the suspension was proper.\* He promptly filed his appeal on October 1, 1992, two weeks after receiving written confirmation that the agency intended to return him to pay status effective September 5, instead of August 22, the day following his acquittal. We find that, under these circumstances, the appellant has established good cause for his untimely filing. See *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980).

There remains a question, however, as to whether the entire suspension is properly considered the action being appealed, as opposed to merely the last fourteen days of it. Under the latter view, the appellant's appeal would be timely, having been filed within 20 days following the effective date of the action (5 C.F.R. § 1201.22(b)), but the Board would lack jurisdiction to review the matter as it would represent a suspension of less than 15 days. 5 U.S.C. § 7512. In *Lester v. United States Postal Service*, 52 M.S.P.R. 57, 59 (1991),


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\*The appellant's situation here is clearly distinguishable from one in which the untimeliness of an appeal to the Board is owing to an appellant's initial failure to realize he had grounds for such an action. The Board has found that this circumstance does not constitute good cause for an untimely filing. See, e.g., *Burkhalter v. Department of the Air Force*, 50 M.S.P.R. 190, 192 (1991), *aff'd*, 956 F.2d 1173 (Fed. Cir. 1992) (Table).

the Board found that the timeliness of an appeal of an indefinite suspension is measured from the effective date of the suspension itself, and not from any subsequent parceling of this suspension. We therefore find that an appeal of an indefinite suspension takes as its action the entire suspension, rather than any discrete portion of it. In the present case, we similarly find that, though the subject matter of the instant appeal is limited to the last fourteen days of his suspension, the appeal nevertheless relates to the entire suspension for jurisdictional purposes.

Accordingly, we remand the matter for a hearing on the merits, i.e., whether the continuation of the appellant's indefinite suspension from August 22 through September 4, 1992, was appropriate.

FOR THE BOARD:

  
Robert E. Taylor  
Clerk of the Board

Washington, D.C.